

European Court of Human Rights: May 2012-April 2013

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1. THE COURT'S WORKLOAD AND INSTITUTIONAL/PROCEDURAL MATTERS

The European Court of Human Rights (hereinafter "the Court"), sitting in plenary session, elected a new President, Dean Spielmann, who took office on 1st November 2012.¹ President Spielmann is the judge elected in respect of Luxembourg and he has been a member of the Court since 2004. He has senior management experience within the Court, including serving as a Section President. A distinguishing feature of his appointment is that he is younger, fifty years-old, than his three predecessors as Presidents of the full-time Court.

In September 2012 the Court issued guidance regarding its approach to unilateral declarations by Member States acknowledging breaches of the European Convention on Human Rights (hereinafter "the Convention" or "ECHR").² The publication of the guidelines was timed to coincide with the entry into force, on 1st September 2012, of the latest version of the Rules of Court. The latter document contains new Rule 62A³ governing unilateral declarations. Unilateral declarations are normally made by a Member State after the failure of, confidential, friendly settlement negotiations between the applicant and the respondent State. According to Rule 62A(1)(c) the State must file its unilateral declaration in public adversarial proceedings. The guidance elaborates that if the applicant accepts the unilateral declaration then the case will be struck-out. However, even if the applicant is not willing to accept the unilateral declaration the Court has the authority⁴ to strike-out the application if the Court considers that the continued examination of the application is not justified. Under the terms of the guidance the following, non-exhaustive, conditions must be satisfied before the Court will be willing to strike-out an application against the wishes of the applicant.

- Existence of sufficiently well-established case-law in the matter raised by the application.
- Clear acknowledgment of a violation of the Convention in respect of the applicant – with an explicit indication of the nature of the violation.
- Adequate redress, in line with the Court's case-law on just satisfaction.

¹ ECHR 334(2012), 10 Sep. 2012.

² "Unilateral declarations: policy and practice", Strasbourg, Sep. 2012.

³ Agreed by the Plenary Court on 2 Apr. 2012.

⁴ Under ECHR Article 37(1)(c).

- Where appropriate undertakings of a general nature (amendment of legislation or administrative practice, introduction of new policy, etc.).
- Respect for human rights: the unilateral declaration must provide a sufficient basis for the Court to find that respect for human rights does not require the continued examination of the application.⁵

If the Court determines that a particular unilateral declaration meets these conditions then the relevant application can be struck-out. The guidance explains that if the respondent State does not provide the individual measures of redress promised in its unilateral declaration then the aggrieved applicant will be able to request the Court to reinstate his/her complaint.

The unilateral declaration/striking-out process is a mechanism that enables the Court to efficiently resolve straightforward repetitive cases, *i.e.* those not raising new legal issues for the Court. Recent years have witnessed a massive expansion in the resolution of cases via this process. According to the guidance in 2007 it was used in 30 cases and by 2011 the process was applied in 692 cases.⁶ But, Professor, now Judge, Keller, expressed concern, based on her academic research, that the Court has been too willing to accept some unilateral declarations.⁷ Therefore, it is to be hoped that the new guidance demonstrates that the Court is going to adopt a robust attitude towards the assessment of whether particular unilateral declarations should be accepted or not.

During 2012 the Court delivered 1,093 judgments.⁸ The Grand Chamber accepted seven cases to be referred (appealed) under Article 43 of the ECHR and eight cases were relinquished to the Grand Chamber by Chambers under Article 30.⁹ The most significant development in the processing of complaints by the Court in 2012 was the large increase in the number of inadmissible applications determined by single-judge formations. Almost 82,000 such applications were declared inadmissible or struck-out by single-judge formations in 2012.¹⁰ That was almost double the number of applications dealt with by single-judges in the previous year. By maximising the utilisation of single-judge formations the Court was able to reduce its case load backlog by 16% during 2012 (in January 2012 the backlog was 151,600 applications and by the end of December 2012 it had been reduced to 121,100 pending applications).¹¹ Consequently, 2012 was the first year in the history of the full-time Court, created by Protocol 11, that saw a reduction in the number of pending cases. The Court hopes to be able to continue reducing the backlog, whilst recognising that it is still far too large. Russian and Turkey retained the unenviable position of the two Member States with the largest numbers of applications pending against them. The UK became the Member State with the ninth biggest total of pending cases (3,300), with the expanding number of prisoners complaining about their disqualification from voting the likely cause of this increase in applications.

⁵ *Supra* n.2 p.2.

⁶ *Ibid.*, p.1.

⁷ Keller, Forowicz & Engi, *Friendly Settlements Before the European Court of Human Rights*, (Oxford: Oxford University Press, 2010), 67.

⁸ European Court of Human Rights *Annual Report 2012* p.153.

⁹ *Ibid.* p. 59.

¹⁰ *Ibid.* p.6.

¹¹ Speech of President Spielmann at the opening of the judicial year, Strasbourg 25 Jan. 2013.

In April 2013 the Council of Europe announced that its negotiators and representatives of the European Union (EU) had settled the terms of the draft accession agreement for the EU to become a party to the ECHR.¹² This has been a protracted process that formally began in the summer of 2010, after the coming into force of Protocol 14 which revised the ECHR to enable accession by the EU.¹³ President Spielmann had publicly urged the parties to overcome the remaining obstacles in their negotiations.

Admittedly, some doubts have been expressed about the usefulness of the accession, in view of certain difficulties encountered during the negotiations. That is quite understandable and nobody expected them to be easy, given the scale of the task. Those difficulties, however, must not serve as a pretext for calling into question this noble endeavour. By acceding to the Convention and thereby allowing external judicial supervision of its action, the European Union will prove that, like its member States, it is willing for its action to be bound by the same international requirements as those applying to the action of individual States. A hallmark of credibility, the external review by the European Court of Human Rights will also be a hallmark of progress. It will represent a powerful message from Europe to the world, indeed a solemn declaration that beyond all its differences and specificities, however legitimate, be they occasional, regional or systemic, Europe shares a common foundation of fundamental rights, which we call human rights. The time has now come for the negotiators to bring their work to fruition and for the European Union, recent recipient of the Nobel Peace Prize, to sign up to the Convention.¹⁴

The draft agreement will be sent to the EU Court of Justice for its formal view on the substance of the text.

ARTICLE 1: FURTHER LIABILITY OF RUSSIA FOR BREACHES OF THE CONVENTION IN TRANSNISTRIA

A Grand Chamber, subject to the dissent of the Russian Judge Kovler, found Russia liable, under Article 1, for the infringement of 170 school pupils and their parents' right to education guaranteed by Article 2 of Protocol No. 1 (P1-2) in *Catan and Others v Moldova and Russia*¹⁵. Eight years earlier, in the well-known case of *Ilascu and Others v Moldova and Russia*¹⁶, another Grand Chamber had found Russia liable for the torture of one of the applicants in the self-proclaimed "Moldavian Republic of Transdniestria ("MRT"). However, in the latest case the Russian government challenged the Court's interpretation of the concept of jurisdiction given in *Ilascu* and the more recent judgment in *Al-Skeini and Others v UK*¹⁷ (analysed in my rapport last year¹⁸). Before the Grand Chamber in *Catan* the Russian government contended that jurisdictional liability under Article 1 should only apply to the territory of a Member State. Alternatively the Russian

¹² Press Release DC041 (2013), Strasbourg 5th April 2013.

¹³ ECHR, Article 59(2).

¹⁴ *Supra* n. 11.

¹⁵ Nos. 43370/04, 8252/05 and 18454/06, 19 Oct. 2012.

¹⁶ No. 48787/99, 8 Jul. 2004 and see A. Mowbray, *Cases, Materials and Commentary on the ECHR*, 169 (3rd ed., Oxford 2012).

¹⁷ No. 55721/07, 7 Jul. 2011.

¹⁸ A. Mowbray, *ECtHR May 2011-April 2012*, 18 Eur. Pub. L. 568-573.

government claimed that, unlike in *Ilascu* and in respect of the UK in *Al-Skeini*, none of its military forces had been involved in any infringements of the applicants' right to education, indeed Russia submitted that it had sought to act as a mediator in the dispute over the applicants' schools.

During the break-up of the former USSR, in June 1990, Moldova proclaimed its sovereignty, it was the successor State to the Moldavian Soviet Socialist Republic (created in 1940) and included a strip of land on the eastern bank of the Dniester river (now called Transdniestria)). In September 1990 separatists announced the creation of the "MRT". During 1991-92 there were armed clashes, resulting in several hundred deaths. The Court in *Ilascu*, found that elements of the Russian army based in Transdniestria helped the separatist, particularly by supplying them with large amounts of arms and ammunition from Russian stocks in Transdniestria. As a result of this Russian military aid the Moldovan forces were unable to gain control over Transdniestria. Russia undertook to withdraw its military forces from Transdniestria by the end of 2003, as part of the Agreement on the Adaptation of the Treaty on Conventional Armed Forces in Europe (1999), but it did not comply. The "MRT" has not been recognised by the international community.

The "MRT" "Constitution" provides that the official languages are "Moldavian", Russian and Ukrainian. A "MRT" "Law" passed in 1992 required that "Moldavian" had to be written with the Cyrillic alphabet and it was made an administrative offence (punishable with a fine) for a person in public or other organisations to breach "MRT" laws concerning the use of languages. During 1994 the "MRT" authorities banned the use of the Latin script in schools and in 2004 those authorities started closing down schools using that script.

The applicants were children/their parents attending three schools using the Latin script. Regarding the Evrica School the "MRT" police forcibly entered the school in July 2004 and evicted the children/teachers/parents who were inside. Following the intervention of the Organisation for Security and Cooperation in Europe the "MRT" authorities permitted the school to re-open in different (inferior) premises from October 2004. The Moldovan government has paid for the school and its staff. The school uses the Latin script. The Alexandru cel Buri school had its water and electricity supplies cut off by the "MRT" authorities during July 2004. It was allowed to re-open in different premises (that cannot be reached by public transport) in September 2004. The school is supported by the Moldovan government and uses the Latin script. However, its pupil numbers have halved between 2002 and 2009. The Stefan cel Mare school, which used the Latin script, was stormed by "MRT" police in August 2004 with the pupils/teachers/parents being evicted. The Moldovan government arranged for the school to be relocated to a village 20km away in an area under its control. The pupils/parents claim that the pupils are harassed by "MRT" officials when then travel to and from the school.

On the issue of the jurisdictional responsibility of Russia the Grand Chamber reaffirmed its *Al-Skeini* approach that Article 1 primarily applied to Member States' national territories, but that exceptional forms of extra-territorial responsibility were also recognised in the Court's jurisprudence. Given that the events in this case arose during the same time-frame as in *Ilascu* it was for Russia to satisfy the Court that it was not liable under Article 1. The Grand Chamber concluded that:

...the Russian Government have not persuaded the Court that the conclusions it reached in 2004 in the *Ilaşcu* judgment were inaccurate. The "MRT" was established as a result of Russian military assistance. The continued Russian military and armaments presence in the region sent a strong signal, to the "MRT" leaders, the Moldovan Government and international observers, of Russia's continued military support for the separatists. In addition, the population were dependent on free or highly subsidised gas supplies, pensions and other financial aid from Russia.

122. The Court, therefore, maintains its findings in the *Ilaşcu* judgment, that during the period 2002-2004 the "MRT" was able to continue in existence, resisting Moldovan and international efforts to resolve the conflict and bring democracy and

the rule of law to the region, only because of Russian military, economic and political support. In these circumstances, the "MRT"'s high level of dependency on Russian support provides a strong indication that Russia exercised effective control and decisive influence over the "MRT" administration during the period of the schools' crisis.

123. It follows that the applicants in the present case fall within Russia's jurisdiction under Article 1 of the Convention.¹⁹

The Grand Chamber, unanimously, also found that Moldova had jurisdictional responsibility for the events complained of as it was the recognised territorial State under public international law.

In his dissenting opinion Judge Kovler referred back to his dissent in *Illascu*. Regarding the current complaints he emphasised that there was no evidence of direct involvement by Russian personnel in the closure of the applicants' school. He also believed that the majority's conclusions regarding Russia's jurisdictional responsibility contained "strong political overtones".

In respect of the applicants' complaints under P1-2 the majority of the Grand Chamber determined that the interruption of the applicants' schooling did not pursue a legitimate aim (it was aimed at the Russification of the language and culture of the people living in Transdniestria as part of the "MRT" goal of unification with Russia). Therefore a breach of that Article had occurred and Russia was liable as it exercised effective control over the "MRT" at that time. The Grand Chamber was united in ruling that Moldova had not breached P1-2 as it had taken all the measures it could to regain control over Transdniestria and it had provided specific measures to help the applicants' continue their education using the Latin script. Judge Kovler voted for no violations of this Article in respect of both Russia and Moldova as he criticised the majority for "judicial activism" in extending the ambit of the right to education beyond its established limits. The majority of the Grand Chamber required Russia to pay each applicant 6,000 euros just satisfaction for the non-pecuniary damage they had suffered.

The above judgment is an unequivocal confirmation of the Court's contemporary approach to jurisdiction under Article 1. The Grand Chamber decisively rejected Russia's argument that the Court should curtail the extra-territorial liabilities of Member States elaborated last year in *Al-Skeini*. What is much more uncertain is the long-term effect this judgment will have on Russia's attitude towards the ECHR and the Court. The Court's adverse judgment against Russia in *Illascu* was believed to be one of the factors that prompted the Russian authorities to delay ratification of Protocol 14's institutional reforms for several years. We shall have to wait to see if Russia seeks to obstructs the next phase of the Strasbourg reform process.

ARTICLE 3: COLLABORATION WITH THE CIA'S EXTRAORDINARY RENDITION PROGRAMME

At the end of 2012 a unanimous Grand Chamber delivered its lengthy judgment in *EL-Masri v The Former Yugoslav Republic of Macedonia*²⁰, which found multiple breaches of the Convention regarding the respondent State's collaboration with the United States of America's covert extraordinary rendition programme. The Court defined extraordinary rendition as "an extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment".²¹ According to the applicant, a German national, on 31 December 2003 he was travelling on a bus from Germany to Skopje for the purpose of taking a short

¹⁹ *Supra* n.15, paras. 121-123.

²⁰ No. 39630/09, 13 Dec. 2012.

²¹ *Ibid.* para. 221.

holiday in the latter city. At the Serbian/Macedonian border officials of the latter State became suspicious of his new German passport. After seven hours of interrogation, during which he was questioned about links with Islamic groups, he was taken, by armed men in civilian clothes, to a hotel in Skopje. He was held in a room on the top floor of the hotel and constantly guarded by an armed team of nine men. He was regularly interrogated, in English, and refused his requests to contact the German embassy. Once, when he tried to leave a gun was pointed at his head and he was told he would be shot. After a week of detention an official offered to return the applicant to Germany if he confessed that he was a member of Al-Qaeda. On the thirteenth day of his detention the applicant began a hunger strike as a means of protesting against his confinement. A week later he was told he would be returned to Germany. On 23 January 2004, the applicant was told to make a video-recorded statement that he had not been harmed and that he was being flown back to Germany. He was then handcuffed, blindfolded and taken to Skopje airport.

At the airport, whilst still handcuffed and blindfolded, he was placed on a chair. He was then severely beaten and all his clothes were cut from his body. An object was inserted into his anus and a suppository was forcibly administered. His blindfold was removed and he saw about eight men dressed in black and wearing ski masks. One of them placed a nappy on him and he was dressed in a track suit. A bag was placed over his head and his legs and arms were chained to a belt around his waist. He was taken to an aircraft where he was restrained, in a spread-eagled stance, on the floor of the plane. The applicant was given two injections and remained unconscious for most of the flight.

On disembarking from the plane the applicant noted that it was warm, and therefore not Germany. Subsequently, he concluded that he had been transported to Afghanistan (via Baghdad). After a short drive from the airport he was placed in a small dirty cell and kicked/beaten. There was no bed in the cell, just a dirty blanket. El-Masri later formed the view that he had been held in a USA Central Intelligence Agency (CIA) facility (a former brick factory) in Kabul known as the "Salt Pit", where high-level terrorism suspects were kept for detention and interrogation. During his detention there he was interrogated several times by a man speaking Arabic, with a Lebanese accent. The interrogations involved threats, insults, pushing and shouting. In March 2004 the applicant began another hunger strike. On the thirty-seventh day of his protest he was subjected to forced feeding via a nasal tube. This caused him to become seriously ill and he was given medication by a doctor. At this time El-Masri felt an earthquake (US Geological Survey records disclosed an earthquake on 5 April 2004 in the Hindu-Kush region). In May 2004 the applicant was visited several times by a man ("Sam") who spoke German. On 21 May 2004 El-Masri resumed his hunger strike. A week later, he was given his suitcase and the remaining clothes that had been taken from him in Macedonia. He was taken to an airplane and chained to a seat where Sam told him they were returning to a European country. El-Masri was blindfolded and had earmuffs placed on his head for the flight. After the plane landed, and still blindfolded, the applicant was driven across different types of roads by a group of men speaking with Slavic accents (they did not tell El-Masri where he was being taken). He was eventually released on a road and told not to look back. He soon encountered three armed officials who took him to a building with an Albanian flag and he was told he was in that country. He was transported to Tirana and flown back to Frankfurt on 29 May 2004.

The Munich public prosecutor began an investigation into the applicant's allegations regarding his treatment in Macedonia and Afghanistan. During 2007 that prosecutor issued arrest warrants against thirteen CIA agents in respect of their alleged involvement with the applicant's extraordinary rendition. The Spanish authorities had supplied the Munich prosecutor with the names, but they were not identified in public. In 2009 a Committee of Inquiry, established by the German Bundestag, found most of the applicant's allegations to be credible. In December 2005 the American Civil Liberties Union filed a claim, on the applicant's behalf, against the former Director of the CIA and unknown agents with the Virginia District Court. The US government asserted State secrets privilege and that defence was accepted by the District and Appeals Courts. The US Supreme Court declined to review the applicant's case. During 2005 the Macedonian

Ministry of the Interior conducted an inquiry into the applicant's case. El-Masri was not asked to provide evidence to the inquiry nor informed of its outcome. The inquiry concluded that the applicant had not been held in the Skopje hotel by officials and he had voluntarily left Macedonia, at the Blace border crossing, on 24 January 2004. In October 2008 the applicant's lawyer lodged a criminal complaint with the Skopje public prosecutor against unidentified Macedonian officials concerning El-Masri's detention in Macedonia and subsequent extraordinary rendition. Two months later the prosecutor rejected the complaint as unsubstantiated (she did not take oral evidence from the applicant, interview the Skopje hotel staff or check relevant aircraft landings/take-offs). Thereupon, the applicant began civil proceedings against the Ministry of Interior in the Macedonian courts. The litigation was still ongoing before the first instance court at the time of the Strasbourg judgment (the Macedonian government claimed that many adjournments had been necessary because of El-Masri's imprisonment in Germany).

The applicant lodged his application at Strasbourg in July 2009. The Macedonian judge withdrew from the Chamber and the respondent State nominated the Danish judge to replace her. In January 2011 the Chamber relinquished jurisdiction to the Grand Chamber. Third-party written comments were received from the United Nations High Commissioner for Human Rights and a number of non-governmental organisations.

Before the Grand Chamber the respondent State contended that the application should be rejected for failing to be brought within the six-month time limit laid down by ECHR Article 35. The Grand Chamber considered that the applicant's delay (between his return to Germany in May 2004 and making his criminal complaint in October 2008) could be explained by the nature of the CIA's secretive extraordinary rendition programme with most Council of Europe States denying any participation in these acts. Therefore, Macedonia's objection was dismissed.

Turning to the applicant's allegations the respondent State denied all of them as being unsubstantiated. The Grand Chamber reaffirmed its well-established evidential standard that disputed facts had to be established beyond reasonable doubt. The applicant's description of his alleged mal-treatment had been detailed and consistent. Furthermore, it was supported by extensive indirect evidence including: aviation logs of USA registered civilian jets to Skopje, from there to Kabul and returning to a military airfield in Albania on relevant dates; scientific tests of the applicant's hair when he returned to Germany confirming that he had spent time in South Asia and geological records of an earthquake during his alleged detention in Kabul. Additionally, Mr H.K. (the Macedonian Minister of the Interior during 2004) had produced a sworn written statement that the Macedonian authorities (the State Intelligence Service) had detained the applicant in accordance with an international arrest warrant issued by the USA and that he had been handed over to the CIA at Skopje airport. The Grand Chamber observed that normally the Court treats statements by minister and officials with "caution" as they generally tend to favour the position of the State they represent. But, where the statement comes from a senior person who played a direct role in the dispute and acknowledges facts unfavourable to the authorities then the Court may consider this to be a form of admission. The respondent government had failed to provide the Court with a plausible explanation of what happened to the applicant once he was detained at their border post. Consequently, the Grand Chamber found that the applicant's allegations had been established beyond reasonable doubt.

El-Masri contended that his detention and interrogation at the hotel, his "capture shock" treatment at Skopje airport and his maltreatment in Afghanistan were the responsibility of Macedonia and violated Article 3 of the Convention. The United Nations High Commissioner for Human Rights stressed the importance of "the right to the truth" being provided to victims (and the families) of forced disappearances. This involved, *inter alia*, States conducting effective investigations into forced disappearances and providing victims with information about the perpetrators. Both Interights and Amnesty International/International Commission of Jurists submitted that this case provided the Court with an opportunity to rule on the illegality of the USA's extraordinary rendition programme. Regarding the implied positive obligation, under Article 3, requiring Member States to conduct effective investigations into arguable complaints of mal-treatment by

officials the Court ruled that the Macedonian prosecutor's brief enquiry was inadequate. She had not queried the Ministry of the Interior's assertions that the applicant had voluntarily stayed in the Skopje hotel and left the country.

Having regard to the parties' observations, and especially the submissions of the third-party interveners, the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened. The issue of "extraordinary rendition" attracted worldwide attention and triggered inquiries by many international and intergovernmental organisations, including the UN human rights bodies, the Council of Europe and the European Parliament. The latter revealed that some of the States concerned were not interested in seeing the truth come out.²²

The Macedonian investigation failed to establish the truth of the applicant's suffering and identify those responsible. A breach of the procedural limb of Article 3 had thereby occurred.

Regarding the extra-judicial detention of the applicant in the Skopje hotel without communication to the outside world and the threat of being shot if he tried to leave, that amounted to inhuman and degrading treatment violating Article 3. The respondent State was also responsible under the Convention for the applicant's mal-treatment at Skopje airport as it occurred in the presence of Macedonian officials and on its territory. Previous jurisprudence had established that persons should not be forcibly undressed unless there were compelling justifications and none had been given in respect of the applicant. Similarly, the forced administration of a suppository to the applicant was not required by any medical necessity. As the above measures were taken with the intention of causing the applicant severe pain and suffering to gain information or intimidate him they amounted to torture. The Grand Chamber found no evidence that the applicant's transfer to the CIA was in response to a lawful extradition request nor to a valid arrest warrant (cf. the written statement of the former Macedonian Minister of the Interior H.K. noted above). The Macedonian authorities knew the aircraft was bound for Afghanistan and public documents (including English and USA court judgments) constituted "reliable sources reporting practices that have been resorted to or tolerated by the US authorities and that are manifestly contrary to the principles of the Convention."²³ Consequently, Macedonia knew/should have known that by subjecting the applicant to extraordinary rendition they were exposing him to a real risk of treatment violating Article 3. His transfer to the CIA, by the Macedonia authorities, was another breach of Article 3.

El-Masri also contended that his rights under Article 5 had been infringed. The Grand Chamber found that no Macedonian court had ordered the applicant's detention. In the judgment of the Grand Chamber it was:

...wholly unacceptable that in a State subject to the rule of law a person could be deprived of his or her liberty in an extraordinary place of detention outside any judicial framework, as was the hotel in the present case. It considers that his detention in such a highly unusual location adds to the arbitrariness of the deprivation.

...the Court reiterates that Article 5 of the Convention lays down an obligation on the State not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction (see *Storck v. Germany*, no. 61603/00, §§ 100-101, ECHR 2005-V, and *Medova v. Russia*, no. 25385/04, § 123, 15 January 2009). The Macedonian authorities not only failed

²² *Ibid.*, para. 191.

²³ *Ibid.*, para. 218.

to comply with their positive obligation to protect the applicant from being detained in contravention of Article 5 of the Convention, but they actively facilitated his subsequent detention in Afghanistan by handing him over to the CIA, despite the fact that they were aware or ought to have been aware of the risk of that transfer. The Court considers therefore that the responsibility of the respondent State is also engaged in respect of the applicant's detention between 23 January and 28 May 2004...²⁴

The applicant's abduction and detention in violation of Article 5 constituted an "enforced disappearance" for which Macedonia was responsible throughout his detention in that country and subsequently in Afghanistan.

The Grand Chamber went on to find that El-Masri's rights to respect for his private and family life, guaranteed by ECHR Article 8 and his Article 13 right to an effective domestic remedy to resolve breaches of Convention rights had also been breached by Macedonia.

The applicant sought 300,000 euros just satisfaction in regard to his non-pecuniary damage (for the suffering, including a mental breakdown, inflicted on him). He based this claim on damages awarded in Swedish, Canadian and UK litigation involving analogous complaints. The respondent State challenged his compensation claim (re)arguing that he had not been subject to extraordinary rendition. Noting the "extreme seriousness of the violations of the Convention of which the applicant was a victim"²⁵ the Grand Chamber awarded him 60,000 euros compensation.

This was a momentous judgment with global implications as the Strasbourg Court unequivocally found that a Member State's collaboration with the USA's covert extraordinary rendition programme violated a number of the most fundamental rights in the ECHR, including the prohibition of torture and the right to liberty. Crucially, a Member State that knowingly transfers a person from its jurisdiction to the USA's extraordinary rendition programme will remain liable under the ECHR for that person's detention by the Americans. The Strasbourg Court should be commended for robustly applying the Convention despite the respondent State's denials of responsibility. Indeed, the credibility and veracity of the Macedonian authorities has been seriously undermined by the Court's findings in *El-Masri*. From a comparative law perspective the Strasbourg Court's willingness to determine the merits of the applicant's complaints casts the US Supreme Court's refusal to consider El-Masri's civil action in a very poor light regarding the protection of basic human rights. More generally, the President of the Council of Europe's Parliamentary Assembly praised the Court; "[t]his judgment can be called historic: it is the first condemnation, by an international court, of the CIA practice of renditions and secret detentions, which the Court has likened to enforced disappearance and cruel and inhuman treatment."²⁶ The judgment also provided judicial recognition and re-enforcement for the dogged investigations and condemnation of several Member States collaboration with the CIA's extraordinary rendition operations undertaken by the Parliamentary Assembly's special rapporteur Dick Marty.²⁷

ARTICLE 5: ADMINISTRATION OF PUBLIC PROTECTION SENTENCES

²⁴ *Ibid.* paras 236 and 239.

²⁵ *Ibid.*, para. 270.

²⁶ Jean-Claude Mignon, Press Release AP230(2012), Strasbourg, 13 Dec. 2012.

²⁷ For an examination of these see, A. Mowbray *supra* n.16 pp. 257-259.

A Chamber found systematic failings in the implementation of Indeterminate Public Protection (IPP) sentences by the prison authorities in the joined case of *James, Wells and Lee v United Kingdom*²⁸. This category of sentence was created by the Criminal Justice Act 2003 and where a defendant was convicted of a specified ("serious") offence and that person had previously been convicted of another "relevant offence" the trial judge was required to impose an IPP sentence. The trial judge imposed a specified period of imprisonment as the "tariff" to punish the convicted defendant, but the latter could not be released from imprisonment under the IPP sentence until the Parole Board considered that the prisoner was no longer a danger to society and ordered his/her release. Soon after the introduction of IPP sentences it became apparent that a large number of convicted defendants fell within the above provisions and were accordingly being given IPP sentences. Many IPP prisoners, like the three applicants, had relatively short fixed tariffs, but the prison system did not have the resources to manage all the IPP prisoners being held. In order to gain release, after serving his/her tariff, an IPP prisoner had to successfully complete relevant courses, such as "Alcohol Free Good Life", to be able to convince the Parole Board that they no longer posed a threat to the public. But only a limited number of ("lifer") prisons had the resources to offer these courses and many IPP prisoners had to wait a long time to gain access to these courses. In regard to the applicants:

Mr James' tariff expired almost one year and 295 days after he was sentenced. He was not progressed through the prison system during that period and recommended courses were unavailable to him. He was not transferred to a first stage lifer prison until five months after his tariff had expired. He was released three months later. Mr Wells' tariff expired 307 days after he was sentenced. He was also not progressed through the prison system during that period and recommended courses remained unavailable to him. He was not transferred to a first stage lifer prison until twenty-one months after his tariff had expired. Thereafter he was given access to relevant courses and completed three such courses over a period of approximately eight months. Mr Lee's tariff expired 163 days after he was sentenced. Like Mr James and Mr Wells, he was not progressed through the prison system during that period and recommended courses remained unavailable to him. He was not transferred to a first stage lifer prison until twenty-five months after his tariff had expired. Although assessments for the course recommended for him then commenced, a further five-month period of delay occurred following a recommendation for prior motivational work which was not available to him.²⁹

The applicants brought separate judicial review proceedings against the Secretary of State responsible for the prison system. The domestic courts found that the Secretary had breached his public law duties in failing to provide adequate courses for IPP prisoners. However, the House of Lords rejected the applicants' contention that their rights under ECHR Article 5 had been violated.

At Strasbourg the applicants' claimed, *inter alia*, that the prison authorities' delays in permitting them access to relevant courses, once they had completed their

²⁸ Nos. 25119/09, 57715/09, & 57877/09, 18 Sep. 2012.

²⁹ *Ibid.*, para. 219.

tariff periods of imprisonment, resulted in their continued detention being arbitrary and a violation of Article 5(1). The government responded that the Secretary of State's failure to provide sufficient rehabilitative courses for all IPP prisoners did not result in the continued detention of IPP prisoners, post-tariff, breaching Article 5(1). Following well-established jurisprudence the Chamber re-affirmed that preventive detention ordered by a sentencing court fell within the exception to the right to liberty elaborated in Article 5(1)(a). However, it was necessary to determine if the applicants' post-tariff detention was arbitrary. Noting Council of Europe and United Nations guidelines on the desirability of rehabilitation programmes for prisoners the Chamber determined that:

...in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation is a necessary element of any part of the detention which is to be justified solely by reference to public protection. In the case of the IPP sentence, it is in any event clear that the legislation was premised on the understanding that rehabilitative treatment would be made available to those prisoners on whom an IPP sentence was imposed, even if this was not an express objective of the legislation itself. Indeed, this premise formed the basis upon which a breach of the Secretary of State's public law duty was found...³⁰

The Chamber accepted that there was no bad faith in the respondent government's introduction or administration of the IPP sentence. Furthermore, the IPP scheme had been subject to major legislative amendments in 2008, making it a discretionary sentence which would normally only be imposed by a sentencing judge when the convicted defendant had been given a tariff of more than two years' imprisonment. But, those reforms did not help the applicants.

The Court considers it significant that substantial periods of time passed in respect of each of the applicants before they even began to make any progress in their sentences... It is clear that the delays were the result of a lack of resources and while, as noted above, resource implications are relevant, it is nonetheless significant that the inadequate resources at issue in the present case appeared to be the consequence of the introduction of draconian measures for indeterminate detention without the necessary planning and without realistic consideration of the impact of the measures. Further, the length of the delays in the applicants' cases was considerable: for around two and a half years, they were simply left in local prisons where there were few, if any, offending behaviour programmes. As Laws LJ indicated, the stark consequence of the failure to make available the necessary resources was that the applicants had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed by the time their tariff periods expired... Further, once the applicants' tariffs had expired, their detention was justified solely on the grounds of the risk they posed to the public and the need for access to rehabilitative treatment at that stage became all the more pressing.

221. In these circumstances, the Court considers that following the expiry of the applicants' tariff periods and until steps were taken to progress them through the prison system with a view to providing them with access to appropriate rehabilitative courses, their detention was arbitrary and therefore unlawful within the meaning of Article 5 § 1 of the Convention. Although in the cases of Mr James and Mr Wells the Court is satisfied that following their transfer there is no evidence of any unreasonable delay in providing them with access to courses, it notes that a

³⁰ *Ibid.*, para. 209.

further five-month delay was encountered by Mr Lee following the recommendation in December 2008 for prior motivational work. The Court considers it significant that by December 2008 Mr Lee was already two years and ten months post-tariff, in the context of a nine-month tariff. It was accordingly imperative that his treatment be progressed as a matter of urgency and in the absence of any explanation from the Government for the delay, the Court concludes that this period of detention was also arbitrary and therefore unlawful within the meaning of Article 5 § 1.

222. There has accordingly been a violation of Article 5 § 1 of the Convention in the case of all three applicants.

The applicants were awarded 3,000, 6,200 and 8,000 euros as compensation for non-pecuniary damage.

The judgment is a strong endorsement of the need for governments to provide adequate resources to fund rehabilitation programmes for prisoners. Clearly, the implementation of the IPP sentence had not been properly planned and when the inadequacy of places on remedial courses quickly became apparent the authorities failed to resolve the problem for several years. It is now clear that if governments introduce schemes imposing potentially lengthy periods of protective imprisonment on convicted defendants the authorities must also establish programmes which enable those prisoners to demonstrate that their danger to society has been ameliorated. If such prisoners are denied adequate access to suitable courses then Article 5 will be breached.

ARTICLE 8: THE APPLICATION OF SECURITY COUNCIL SANCTIONS

In *Nada v Switzerland*³¹, the Grand Chamber scrutinised the application of anti-terrorism sanctions, authorised by the United Nations' Security Council (hereafter the SC), by a Member State in accordance with the latter's obligations under the ECHR. This important judgment has similarities with the earlier ruling of the (then) Court of Justice of the European Communities (Luxembourg Court) in the well-known *Kadi* case³² in which the Luxembourg Court determined that EC regulations adopted to implement the same SC resolutions violated the applicants' fundamental property rights. Nada is an Italian and Egyptian national who has lived in Campione d'Italia, a 1.6 sq. km Italian enclave surrounded by Swiss territory, since 1970. He is in his eighties and owns a number of businesses in the field of banking and foreign trade. During October 1999 the SC adopted Resolution 1267 (1999), under Chapter VII of the UN Charter, to impose sanctions on the Taliban. This was a response to bombings of USA embassies by associates of Osama bin Laden. The Resolution established a Sanctions Committee, comprising the members of the SC, to monitor the enforcement of the sanctions. A year later the Swiss federal government issued an Ordinance (the Taliban Ordinance) implementing the SC sanctions. At the end of 2000 the SC expanded the sanctions to apply to Osama bin Laden, Al-Qaeda and senior Taliban officials. The Sanctions Committee was to maintain a list of persons connected to these organisations, with

³¹ No. 10593/08, 12 Sep. 2012.

³² *Yasi Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05P, 3 Sep. 2008.

States supplying relevant names. In April 2001 the Swiss Taliban Ordinance was amended to take account of the changes to the SC sanctions system and persons on the list maintained by the Sanctions Committee were prohibited from entering or transiting through Switzerland. The Swiss Federal Prosecutor began an investigation into Nada in October of that year. A couple of weeks later the President of the USA ordered the blocking of assets of a bank in which Nada was the principal shareholder and chairman. Two days later Nada, and a number of organisations connected with him, were added to the list maintained by the Sanctions Committee (during the later Strasbourg proceedings the Swiss government confirmed that it was the USA that had sought Nada's addition to the list). Switzerland joined the UN in September 2002. Two months later when Nada visited London he was arrested and deported to Italy and his money seized. In October 2003, following criticisms from the SC monitors, the Canton of Ticino revoked Nada's special border-crossing permit that enabled him to transit across Swiss territory to and from Campione d'Italia and the rest of Italy. During 2004 the Swiss federal authorities refused Nada's requests to transit through Swiss territory for medical treatment and legal proceedings. However, in May 2005 the Swiss Federal Prosecutor closed the investigation into Nada, finding the accusations against him were unsubstantiated. Nada subsequently requested the Swiss federal government to delete his name from the Taliban Ordinance, but that was refused as the government asserted only the Sanctions Committee could amend the list of designated persons/organisations. In 2007 the SC body dealing with representations for delisting rejected Nada's request, refused to inform him which State had requested his listing or provide the reasons for his listing. At around the same time the Swiss Federal Court rejected Nada's challenges to the application of the Taliban Ordinance to him by the Swiss authorities. The Italian government requested the Sanctions Committee to delist Nada, in July 2008, but that request was denied. He was permitted to enter Switzerland for two days in September of that year. In July 2009 the USA requested Nada's delisting by the Sanctions Committee. The following month he made a similar request and in September 2009 Switzerland notified the Sanctions Committee that the Federal Prosecutor had found no evidence linking Nada with other persons or organisations on the list. On 23 September 2009 Nada's name was removed from the SC sanctions list and in early October 2009 the Swiss Taliban Ordinance was amended accordingly.

Nada applied to the Court in February 2008 complaining, *inter alia*, that the ban on him entering or transiting through Switzerland, as a consequence of the application of the Taliban Ordinance, violated his right to respect for private and family life, honour and reputation guaranteed by Article 8 of the ECHR. The governments of France and the UK made written comments to the Chamber, but the Italian government did not intervene. Subsequently, the Chamber relinquished jurisdiction to the Grand Chamber. The non-governmental organisation JUSTICE was given permission to submit written comments to the latter body and the UK government made oral submissions during the hearing before the Grand Chamber.

The Swiss government, supported by France and the UK, contended that the application was inadmissible *ratione personae* as the actions of the Swiss authorities were mandated by SC Resolutions that prevailed over the other international legal obligations of Member States. JUSTICE argued that these Resolutions generated "draconian restrictions" on Convention rights, including Article 8, and the UN system did not provide equivalent measures of protection. The Grand Chamber, unanimously, dismissed the States' claim of inadmissibility. According to the Grand Chamber the SC

Resolutions obliged States to take action themselves at the national level to implement the prescribed sanctions. Therefore, the travel restrictions imposed on the applicant by the Swiss Taliban Ordinance fell within the jurisdiction of that State for the purposes of the Convention.

Regarding the applicant's complaints under Article 8, he submitted that the Swiss travel restrictions had infringed respect for his private and family life by preventing him from participating in family events such as weddings and funerals. Additionally, his designation under the Taliban Ordinance had caused damage to his honour and reputation by associating him with suspected supporters of terrorism. The Swiss government responded that the applicant had not been subject to any restrictions on who could visit him at his home. Furthermore, if he wished to travel across Swiss territory in order to attend family events he could have sought an exemption from the sanctions. The Grand Chamber determined that the travel restrictions imposed on the applicant for at least six years amounted to an interference with his right to private and family life. The applicant did not dispute the legal basis for the restrictions (the Taliban Ordinance) nor that they had a legitimate aim under Article 8(2), to prevent crime and protect national security. Therefore, the disputed issue was whether the restrictions were "necessary in a democratic society". The Swiss, French and British governments were united in submitted that States had no latitude in implementing these SC Resolutions. But the Grand Chamber concluded "that Switzerland enjoyed some latitude, which was admittedly limited but nevertheless real, in implementing the relevant binding Resolutions".³³ This was based, *inter alia*, on the Resolutions permitting transit of a designated person where necessary for a judicial process. The Grand Chamber expressed its surprise that Switzerland had failed to notify the Sanctions Committee for four years that its Federal Prosecutor had closed the investigation into the applicant. Also, the effects of the travel restrictions were to prevent the applicant from leaving the enclave of Campione d'Italia.

...the Court considers in particular that the Swiss authorities did not sufficiently take into account the realities of the case, especially the unique geographical situation of Campione d'Italia, the considerable duration of the measures imposed or the applicant's nationality, age and health.³⁴

Given the "special character" of the ECHR as a treaty establishing a system of collective enforcement of fundamental rights, the Grand Chamber held that:

...the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should have persuaded the Court that it had taken- or at least had attempted to take- all possible measures to adapt the sanctions regime to the applicant's individual circumstances.³⁵

Therefore, the Grand Chamber considered that it was dispensed from having to rule on the hierarchy of obligations of Member States under the ECHR and the UN Charter. Overall, the Grand Chamber, unanimously, concluded that Switzerland had not achieved

³³ *Supra* n.8, para. 180.

³⁴ *Ibid.*, para. 195.

³⁵ *Ibid.*, para. 196.

a fair balance between the applicant's right to respect for his private and family life and the State's legitimate aims of preventing crime and safeguarding national security. Hence the applicant had suffered a violation of Article 8. The Grand Chamber did not consider it necessary to determine the applicant's complaint in respect of the alleged damage to his honour and reputation. He did not seek any damages.

President Bratza with Judges Nicolaou and Yudkivska issued a concurring opinion in which they disagreed with the Grand Chamber's judgment that Switzerland possessed some latitude when implementing the SC Resolutions. Judge Rozakis joined by Judges Spielmann and Berro-Lefevre also issued a separate concurring opinion. They believed the Grand Chamber should have determined the applicant's complaint about his honour and reputation as an integral element of his invocation of Article 8. The Grand Chamber's "side-stepping" of this aspect of his complaint gave the impression that honour and reputation were not central elements of a person's private life. Judge Malinverni produced his own concurring opinion in which he too disagreed with the Grand Chamber's view that the SC Resolutions accorded Switzerland discretion to apply the specified sanctions. In addition he was critical of the Grand Chamber for not addressing the underlying issue of the conflict between international law norms.

The judgment in *Nada* constitutes another significant international judicial determination that the implementation of UN SC anti-terrorism sanctions have infringed the basic human rights of specific persons. Certainly the highly unusual territorial location of the applicant's long-established home greatly exacerbated the negative effects of the UN travel restrictions he was subjected to. But, Switzerland's failure to inform the UN Sanctions Committee for over four years that it had found no links between the applicant and any of the other persons/organisations specified by the SC may have contributed to the undue prolongation of those restriction on him. There is also substance to Judge Malinverni's criticism that the Grand Chamber failed to be sufficiently bold and directly address the issue of a conflict between Member States obligations under the ECHR and the UN Charter/SC resolutions. However, at least the Grand Chamber ruled that Member States must "as far as possible"³⁶ seek to harmonise those obligations if they are divergent. Furthermore, where Convention rights are involved Member States must have regard to the personal circumstances of individuals when applying UN sanctions to them.

Article 9: FREEDOM TO MANIFEST A RELIGIOUS BELIEF

Four applicants claimed that their right to manifest their, Christian faith, had been breached in *Eweida and others v United Kingdom*³⁷. Nadia Eweida is a practising Coptic Christian who worked as a member of the check-in staff of British Airways plc at Heathrow airport from 1999. In 2004 a new uniform for those staff was introduced together with a "wearer guide". The latter document provided that any accessory or clothing required for mandatory religious reasons was to be covered up by the uniform. The company permitted, *inter alia*, Sikh male employees to wear dark blue or white turbans and female Muslim staff to wear hijabs in company approved colours. Until May

³⁶ *Ibid.*, para. 197.

³⁷ Nos. 48420/10, 59842/10 and 36516/10, 15 Jan. 2013.

2006 Eweida wore a cross on a chain , as a symbol of her commitment to her faith, concealed under her uniform. Then she started wearing it openly. After various exchanges with management she was sent home, without pay, on 20 September 2006 as she refused to cover up her cross. A month later she was offered administrative work, without customer contact, where no uniform restrictions applied, but she refused the offer. In January 2007, following consultations with staff and their trade unions, British Airways announced a change to its uniform policy. Visible displays of permitted religious and charity symbols by staff would be allowed. The cross and star of David were immediately permitted. Eweida returned to work, openly wearing her cross, at the beginning of February 2007. She unsuccessfully brought discrimination claims against British Airways with the Court of Appeal ultimately rejecting her complaints.

Shirley Chaplin is a practising Christian who has worn a cross on a chain around her neck since her confirmation in 1971. From 1989 to 2010 she worked as a nurse in an NHS hospital, where she had an exemplary employment record. Her hospital had a uniform policy, based on national guidance, that prohibited necklaces being worn (to reduce the risk of injury when handling patients: who might grab hold of the necklace). Managers had the power to permit jewellery/clothing for religious/cultural reasons. In 2007 a new uniform was introduced at the hospital which included a V-neck tunic for nurses. In 2009 Chaplin's manager required her to stop wearing her neck chain/cross for health and safety reasons. A compromise could not be agreed between Chaplin and management and the former was moved to a temporary non-nursing position, which ended a few months later. Chaplin also brought unsuccessful discrimination proceedings against her employer.

Lilian Ladele, a Christian who believes that same-sex civil partnerships are against God's law, had been employed by Islington Council since 1992. Ten years later she became a registrar of births, deaths and marriages. In 2005 legislation came into effect providing for the registration of same-sex civil partnerships. Islington Council required all its existing registrars to undertake the role of civil partnership registrars (some other councils permitted registrars with sincere religious objections to be exempt from undertaking such a role). Following complaints (of victimisation) from homosexual colleagues against Ladele's refusal to undertake the role of civil partnership registrar she was subject to disciplinary proceedings by the Council. Her claims against the Council were ultimately rejected by the Court of Appeal.

Gary McFarlane is a practising Christian who believes that the Bible states that homosexual activity is sinful. He worked as a counsellor for Relate, a private organisation providing sex therapy and relationship counselling, from 2003 until his dismissal in 2008. From 2007 concerns grew in the organisation that McFarlane was unwilling to work on sexual issues with homosexual couples. The professional Code of Ethics, which Relate counsellors had to observe, included an obligation to avoid discrimination on grounds including sexual orientation. Following various meetings with superiors McFarlane was eventually dismissed for gross misconduct as Relate's General Manager concluded that he had no intention of providing sexual counselling to homosexual couples. McFarlane also lost his claims for unfair dismissal and discrimination.

Twelve third-parties submitted written comments to the Court. They included three Bishops from the UK who contended that the wearing of the cross was the manifestation of a religious belief and the ILGA- Europe, together with several other

third-parties, who noted that exceptions to discriminations laws were mainly given to religious organisations (rather than to individuals).

The Chamber found that Eweida's insistence on wearing the cross was a manifestation of her religious belief and therefore fell within the protection of Article 9. As the interference with that right had been caused by the actions of a business the issue was whether the respondent State had failed to comply with its positive obligation to safeguard the applicant's right. The key factor was had a fair balance been achieved between her right and those of the company?

On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer's wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida's cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways' brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance.

95. The Court therefore concludes that, in these circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect the first applicant's right to manifest her religion, in breach of the positive obligation under Article 9. In the light of this conclusion, it does not consider it necessary to examine separately the applicant's complaint under Article 14 taken in conjunction with Article 9.³⁸

Judges Bratza and Thor Bjorgvinsson dissented as they considered that the domestic judiciary had carried out a fair balancing exercise when determining Eweida's litigation.

The Chamber was unanimous in finding no violation of Article 9 or that Article in combination with Article 14 (prohibition of discrimination) concerning Chaplin. As she had been employed by a public authority the Court was required to determine if the interference with her right to manifest her religious beliefs was a proportionate measure to secure one of the aims identified in Article 9(2). In the judgment of the Chamber:

...the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.

100. It follows that the Court is unable to conclude that the measures of which Ms Chaplin complains were disproportionate. It follows that the interference with her freedom to manifest her religion was necessary in a democratic society and that there was no violation of Article 9 in respect of the second applicant.

101. Moreover, it considers that the factors to be weighed in the balance when assessing the proportionality of the measure under Article 14 taken in conjunction with Article 9 would be similar, and that there is no basis on which it can find a violation of Article 14 either in this case.³⁹

³⁸ *Ibid.* at paras. 94-95.

³⁹ *Ibid.* at paras. 99-101.

Ladele focussed her complaint on the contention that she had suffered a violation of Article 14 in association with Article 9 on the grounds of religious discrimination. However, the majority of the Chamber noted that her local authority employer had sought to ensure that all its employees did not discriminate against others. Furthermore, the Court's case-law demanded very serious grounds to justify differences of treatment of persons due to their sexual orientation and that same-sex couples needed legal protection of their relationships. Additionally, the established jurisprudence generally permitted States a wide margin of appreciation to balance competing rights under the ECHR. Consequently five judges rejected her complaint. Judges Vucinic and De Gaetano issued an extremely strongly worded partly dissenting opinion. They viewed her treatment thus:

In the third applicant's case, however, a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough of Islington (which clearly favoured "gay rights" over fundamental human rights) eventually led to her dismissal. ...

Given the cogency, seriousness, cohesion and importance of her conscientious objection (which, as noted earlier, was *also* a manifestation of her deep religious convictions) it was incumbent upon the local authority *to treat her differently* from those registrars who had no conscientious objection to officiating at same-sex unions – something which clearly could have been achieved without detriment to the overall services provided by the Borough including those services provided by registrars, as evidenced by the experience of other local authorities. Instead of practising the tolerance and the "dignity for all" it preached, the Borough of Islington pursued the doctrinaire line, the road of obsessive political correctness. It effectively sought to force the applicant to act against her conscience or face the extreme penalty of dismissal – something which, even assuming that the limitations of Article 9 § 2 apply to prescriptions of conscience, cannot be deemed necessary in a democratic society. Ms Ladele did not fail in her duty of discretion: she did not publicly express her beliefs to service users. Her beliefs had no impact on the content of her job, but only on its extent. She never attempted to impose her beliefs on others, nor was she in any way engaged, openly or surreptitiously, in subverting the rights of others. Thus, even if one were to undertake the proportionality exercise referred to in [the judgment of the majority] with reference to whatever legitimate aim the Borough had in view, it follows that the means used were totally disproportionate.⁴⁰

Regarding McFarlane the Chamber was united in deciding that, as with Eweida, his complaints should be assessed in terms of the State's positive obligations due to the fact that he had been employed by a private sector company. The Chamber also ruled that the Court would not follow the approach utilised by the former Commission that the possibility of an employee resigning and seeking alternative employment, when faced with restrictions on his/her religious practice by the current employer, was a means of finding no interference with the employee's Article 9 rights.

Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.⁴¹

Applying the new approach the Chamber held that:

While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the

⁴⁰ Partly Dissention Opinion at paras. 5 and 7.

⁴¹ *Supra* n. 30 at para. 83.

question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck (see paragraph 83 above). However, for the Court the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others. In all the circumstances, the Court does not consider that this margin of appreciation was exceeded in the present case.

110. In conclusion, the Court does not consider that the refusal by the domestic courts to uphold Mr McFarlane's complaints gave rise to a violation of Article 9, taken alone or in conjunction with Article 14.⁴²

The Chamber went on to award Eweida 2,000 euros compensation for non-pecuniary damage, but rejected her claim for pecuniary damage in respect of her loss of earnings. The judgment observed that she had been offered back-office work, at the same rate of pay, by British Airways and whilst she had not been working for the company she had received donations exceeding double her lost pay.

The Court's judgment in the above applications received considerable attention in the British media, with most coverage being given to Eweida's victory. From a legal perspective the judgment disclosed that the Court would apply a fair balance test when assessing if the domestic authorities had adequately weighed the competing interests of employees asserting Article 9 rights against employers relying on other Convention rights. Furthermore, the national authorities were accorded a wide margin of appreciation by the Court when determining if a fair balance had been achieved. By the use of these legal devices the Court was able to avoid making any specific pronouncements on how clashes between Article 9 religious belief rights and the prohibition of discrimination on sexual orientation grounds under Article 14 combined with other substantive Convention rights should be resolved. Nevertheless, the judgment did enhance the protection given to employees wishing to manifest beliefs falling within the scope of that Article (encompassing both religious and secular values), as the Court ruled that the relevant State could not simply claim that Article 9 was satisfied by the ability of the employee to resign and seek alternative employment where he/she would have greater freedom to manifest his/her beliefs. Now domestic law must ensure that employers only place proportionate restrictions on employees' right to manifest their protected beliefs.

Article 10: SAFEGUARDING PLURALISM IN TELEVISION BROADCASTING

The Grand Chamber judgment in *Centro Europa 7 S.r.l. and Di Stefano v Italy*⁴³, had as its backdrop the dominant influence (former) Prime Minister Silvio Berlusconi exercised over television broadcasting in Italy. He was the controlling shareholder in the Mediaset group of companies, which owned roughly half of the national tv networks in Italy. Furthermore, as Prime Minister he had been, according to a Resolution of the Council of Europe's Parliamentary Assembly, "...in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main competitor."⁴⁴ In combination Mediaset and RAI's broadcasts attracted 90% of the tv audience in Italy. The applicant company (hereafter Centro) successfully obtained a licence from the Italian authorities,

⁴² *Ibid.* at paras. 109-110.

⁴³ No. 38433/09, 7 Jun. 2012.

⁴⁴ Resolution 1387 (2004), 24 Jun. 2004.

in 1999, to operate a nationwide analogue tv network (covering 80% of the national territory on three frequencies). The licence provided that the frequencies would be allocated in accordance with the national frequency allocation plan and Centro should ensure that its broadcasting installations were compatible with the plan within twenty-four months. However, Centro was not allocated any frequencies and several Laws passed by the Italian Parliament authorised existing tv broadcasters (known as “over-quota channels” as they infringed media concentration limits set in 1997 by the Italian authorities) to continue broadcasting.

Centro began administrative law proceedings against the Ministry of Communications and RTI (a Mediaset tv network) which resulted in judgments in the company’s favour from the Lazio Regional Court and the Consiglio di Stato. In 2009 the company was able to start broadcasting on one frequency. But the company did not consider that satisfied the terms of its licence and it resumed its legal action (which was still pending when the Grand Chamber delivered its judgment). A second set of administrative law proceedings were also initiated by Centro, in 2003, seeking compensation. They led to the Consiglio di Stato seeking a preliminary ruling from the CJEU on the application of EU law and Article 10 of the ECHR to the Italian legislation governing broadcasting. The CJEU ruled that freedom to provide services under EU law required not only the granting of broadcasting authorisations but also the provision of frequencies to those who had received the former. The CJEU determined that it need not rule on the application of Article 10 of the ECHR in the context of EU law. Subsequently, the Consiglio di Stato held that it could not allocate tv frequencies, but ordered the government to deal with Centro’s request for frequencies in accordance with the ruling of the CJEU. Centro submitted an expert valuation assessing its loss of profits at 2.175 billion euros (this was based on the profits generated by the Mediaset over quota tv channel that should have surrendered its frequencies to Centro). The Consiglio di Stato refused to take into account the expert valuation and awarded Centro just over 1 million euros compensation.

Centro and its statutory representative, the second applicant, lodged an application with the Court in 2009. A Chamber subsequently relinquished jurisdiction, under Article 30 of the ECHR, to the Grand Chamber. The government’s contention that the second applicant lacked standing was accepted by the Grand Chamber, as it was Centro that had been granted the licence and brought the domestic legal proceedings. Regarding Article 10 of the ECHR Centro argued that it had suffered a violation of its freedom to impart information and ideas as no broadcasting frequencies had been allocated to it by the Italian authorities for nearly a decade. Open Society Justice Initiative, part of the Soros Foundation network, in its third-party comments submitted that Centro’s complaint should be assessed in the context of the “malaise” in Italian broadcasting and that the Court should consider requiring systemic measures to be taken to guarantee pluralism in Italian broadcasting if the Article 10 complaint was upheld. The government responded that Centro had not been allocated broadcasting frequencies due to the reorganisation of national and local frequencies in a situation where there were limited frequencies and existing broadcasters had successfully appealed to the domestic courts. Implicitly the government also sought to downplay the importance of the applicant company’s broadcasts noting that they included “horror films and adult films”.

The Grand Chamber observed that its previous case-law had established a number of relevant principles including the following:

...to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.

...

A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive...

The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism (see paragraph 130 above). This is especially desirable when, as in the present case, the national audiovisual system is characterised by a duopoly.⁴⁵

However, Cento's complaint differed from earlier applications as it had been granted a licence to broadcast. But, the Grand Chamber noted that as the authorities had failed to allocate any frequencies to the company for nearly a decade the licence had been of no practical use for that period of time. Hence Centro had suffered an interference with the exercise of its right to impart information and ideas.

The next issue for the Grand Chamber was whether the government could justify interfering with Centro's freedom of expression under Article 10(2). Such interferences have to be "prescribed by law" and the Grand Chamber, taking account of the CJEU's critical comments regarding the Italian broadcasting legislation delivered in its preliminary ruling, determined that relevant domestic law lacked adequate clarity and precision. Consequently, Centro was deprived:

...of the measure of protection against arbitrariness required by the rule of law in a democratic society. This shortcoming resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.⁴⁶

Centro's complaint of a breach of Article 10 was upheld by all the Judges except Judge Steiner, as she considered that the company had not lodged its application within the six-month time limit specified by Article 35(1) of the ECHR.

Centro also alleged that it had been a victim of discriminatory treatment, compared to Mediaset, in the exercise of its right to freedom of expression (breach of Article 14 in conjunction with Article 10 of the Convention). Fascinatingly, the government contended that "a political approach" should not be adopted in respect of this complaint, and there was no connection between the circumstances of Centro and Mediaset. The Grand Chamber, unanimously, held that it was not necessary to examine this complaint having regard to the earlier finding of a breach of Article 10. A large majority (14 votes to 3) of the Grand Chamber went on to find a breach of Centro's right to the peaceful enjoyment of its property (Article 1 of Protocol No. 1 of the ECHR).

⁴⁵ *Supra* n.43 at paras. 130-134.

⁴⁶ *Ibid.* at para. 156.

The final, and most divisive, issue for the Grand Chamber was Centro's claim for over 2 billion euros just satisfaction (under Article 41 of the Convention). The company repeated its domestic claims for alleged loss of earnings and additionally sought 10 million euros in respect of non-pecuniary damage. The government believed the company's claims were excessive. A bare majority of the Grand Chamber (nine votes to eight) determined that the Consiglio di Stato's award of compensation to Centro could not be regarded as sufficient, particularly as no expert valuation had been ordered by the court. The majority accepted that Centro had lost earnings/profit as a result of the lengthy delay in the allocation of frequencies, but the majority considered that it was not possible to calculate a precise amount of pecuniary damage given the uncertainties of the company's position. Centro had also suffered non-pecuniary damage and the Court:

...may award pecuniary compensation for non-pecuniary damage to a commercial company. Non-pecuniary damage suffered by such companies may include aspects that are to a greater or lesser extent "objective" or "subjective". Aspects that may be taken into account include the company's reputation, uncertainty in decision-planning, disruption in the management of the company (for which there is no precise method of calculating the consequences) and lastly, albeit to a lesser degree, the anxiety and inconvenience caused to the members of the management team...⁴⁷

Consequently the majority awarded a total sum of 10 million euros compensation to Centro. Four Judges⁴⁸ issued a joint partly dissenting opinion in which they expressed the belief that the Grand Chamber should have sought an expert opinion on the losses of Centro. Furthermore, they considered that the commissioning of such an expert opinion would have facilitated a friendly settlement between the government and Centro. Judges Popovic and Mijovic concluded that Centro had lost its victim status as it had received compensation via the Italian courts and the Grand Chamber should have respected Italy's margin of appreciation on the matter.

The judgment in *Centro* develops the Chamber ruling in *Manole and others v Moldova*⁴⁹, by extending Member States' positive obligation to secure plurality in the audiovisual media to the broadcasting of entertainment programmes going beyond the coverage of political news and other topics of public interest. That echoes the original Court's ruling that entertainment broadcasts, including pop music, fell within the right to freedom of expression in *Groppera Radio AG v Switzerland*⁵⁰. However, we may speculate that it was the nature of Centro's programming that led the Grand Chamber to refrain from requiring Italy to undertake systemic reform of its broadcasting regulatory regime, as advocated by the non-governmental third-party intervener, compared to its judgment in *Manole*. The Grand Chamber also avoided becoming entwined in domestic politics regarding the media power of Prime Minister Berlusconi by refusing to examine Centro's Article 14 discrimination complaint. At the date of the hearing before the Grand

⁴⁷ *Ibid.* at para. 221.

⁴⁸ Judges Sajo, Karakas, Tsotsoria and Steiner.

⁴⁹ No. 1396/02, 17 Sep. 2009; discussed in my earlier Rapport, A. Mowbray, *ECtHR May 2009-April 2010*, 16 Eur. Pub. L. 515-517.

⁵⁰ No. 10890/84, 28 Mar. 1990.

Chamber, 12 October 2011, he was still the Prime Minister. However, during the following month Berlusconi was forced to resign when he lost his parliamentary majority, as a consequence of the Italian debt crisis within the Eurozone. Nevertheless, the Grand Chamber's conclusion that the relevant Italian legislation governing broadcasting, most of which had been enacted during his period in office, failed to meet the requirements of Article 10(2) was yet another European condemnation of that regulatory system. A diverse range of other European institutions from the Council of Europe's Venice Commission⁵¹ to its Commissioner for Human Rights⁵² had previously expressed criticisms of the concentration of ownership and control of television broadcasting permitted by Italian law. More generally the judgment in *Centro* is another example of the Strasbourg Court working in harmony with the CJEU in their, currently, separate, but overlapping jurisdictions. The CJEU resisted the Consiglio di Stato's request for the former to express a view on the application of Article 10 of the ECHR and the Strasbourg Grand Chamber subsequently took account of the CJEU's critical opinion on the compatibility of Italian broadcasting legislation with EU law when determining if there had been a violation of Article 10.

There is substance in the partly dissenting opinion of Judge Sajo and colleagues that the majority did not utilise the services of a financial expert to obtain a more accurate calculation of the amount of pecuniary damage suffered by *Centro*. This failure is even more inexplicable when we remember that the majority conclude that the compensation awarded by the Consiglio di Stato; "...cannot be regarded as sufficient, especially as no expert valuation was ordered by the domestic courts to quantify the losses sustained"! This case vividly discloses that the Court's Article 41 responsibilities are not those of a "small claims court" and where large sums of compensation are at issue the Court should articulate and apply clear criteria supported in appropriate cases with expert financial advice.

⁵¹ Opinion on the compatibility of the "Gasparri" and Frattini" laws of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media", 10-11 Jun. 2005.

⁵² Discussion paper on "Media Pluralism and human rights", 6 Dec. 2011.